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Getting to the Chef's Table — The Future of Litigation Management

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In the fine dining business the Chef's Table has emerged as the best table in the house. Diners used to cringe when brought to a table near the kitchen. Diners would have to raise their voices to be heard over the noise and chaos of the kitchen. Now diners wait months to pay a premium price to sit at a table in the kitchen. Why? The Chef's Table offers something not available in the traditional dining experience. Restaurants use their Chef's Table as a forum for showcasing their talents and for demonstrating their creativity. Fine dining aficionados know that their dining experience moves to the next level when they sit at the Chef's Table.

How does this restaurant business phenomenon relate to developments in the litigation management industry?

Purchasers of legal services, whether within a corporate legal department or claims organization, know that the defense attorneys to whom they assign cases are very much like the chefs in this analogy. Defense attorneys take a common set of ingredients and tools and fashion them to achieve the best outcome possible. Using the ingredients of the legal arena like motions, pleadings, discovery, trial and defense strategies, some defense attorneys and their firms distinguish themselves consistently, just as the Charlie Trotters of the world have done in the culinary realm. Meanwhile, other attorneys produce only mediocre or acceptable fare.

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Litigation managers are now seeking the equivalent of the Chef's table in their own profession. They seek a professional experience that is truly at the next level, one that enables them to be more involved in the process and a process that improves the outcomes of the cases they are managing.

Old fashioned litigation management styles

It is important to understand the history of litigation management trends, and particularly the history of relationships between corporate legal departments, claims organizations and their outside defense firms to fully appreciate the evolution of those relationships.

Litigation Management several decades ago was analogous to Country Club dining – limited menus, little customer input – and a monthly club tab that underwent little scrutiny...

Through the several decades preceding the late 1980s, defense firms and their clients enjoyed relationships framed in the context of trust. Clients and firms worked essentially in separate and distinct professional realms. Legal services were provided, shaped and directed almost exclusively by the firm. The corporate legal department or claims organization would assign their case, require relatively little information during the life of the litigation and would receive a summary invoice with little detail at the conclusion.

This process was a bit analogous to country club dining — what was served on the legal services menu was pretty much what the firms wanted to serve, clients provided little or no direction for how cases should be prepared, there were no individual invoices for cases and the client paid his or her overall legal services tab at the end of each month with little detail provided.

The enormous spike in litigation costs in the late 1980s and 1990s changed everything. Driven significantly by the insurance market, cost control efforts resulted in two industry-changing trends. First, detailed client litigation guidelines directed counsel on increasingly minute details relative to the preparation of the defense. Second, e-billing guidelines and the adoption of third-party invoice auditors forever changed the relationship between firm and client.

E-billing and the focus on invoices

The history of the past decade or so in the legal services industry is one of firms and clients struggling to find the proper balance between the relationships of old, based on trust, and the relationships of new, based on detailed guidelines and bill review. Technology of course has played a key role in the development of this new paradigm. As the third-party auditing model grew increasingly less acceptable, clients used new technologies to bring invoice review in-house. As corporate and claims litigation managers gained increasing responsibilities, complex matter management applications helped them to track and categorize their cases and store the correspondence and updates sent to them by firms.

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In fact, the proliferation of e-billing companies and matter management companies in the late 1990s and early 2000s has substantively defined where we are today. And where are we? Most would agree that a key item missing in the relationships of old, the invoice, has become a primary focus in the relationship of new – perhaps to the exclusion of other key considerations. Electronic invoicing, the ability to screen invoices, automatically adjust invoices and to compare firms on rates, average rates, fees and costs, has placed emphasis squarely on the bill.

There is a bit of unease when speaking to clients and firms alike about this emphasis on the bill. Firms of course, for the most part, are apprehensive about the technology. While it offers firms some operating efficiencies, firms frequently voice their opinion that to focus so squarely on the invoice misses the bigger picture, and that the quality of their work, the responsiveness and expertise of their attorneys has contributed in a meaningful way to an improved outcome for their clients. They express concern that the myriad of metrics and data available from detailed analysis of invoice charges and fear that UTBMS task and activity codes will be misapplied, misused and misunderstood.

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Even the most aggressive of insurance company and corporate litigation managers understand that the invoice is a byproduct of a more holistic process. While they may agree that the cost efficiencies of electronic invoicing are beneficial in their own right,

they hesitate at suggesting that cleaner invoices drive better outcomes. And for litigation managers focused on where 70 to 80 percent of their costs are going, outcome is everything. The focus on the legal invoice is a bit analogous to dining at a fine restaurant with the goal of having the best possible meal then carefully delineating how each meal should be constructed, and focusing exclusively on the restaurant tab, rather than the quality of the meal.

To be fair, systems that track case data and facilitate the smoother, quicker and more accurate processing of invoices, are extremely valuable to client and firm alike. This is particularly true when viewed as part of broader process, one that focuses on improved outcome as the principal goal. Without this broader context, of course, the value proposition is diminished and short term.

Emerging technologies are making it possible to bring the client “into the kitchen”, closer to the firm, the process, and the result.

Taking the next step in litigation management

Interestingly, just as e-billing and matter management technologies drove a new paradigm into place in the last decade, new and emerging litigation management tools are making it possible to focus on the way that clients and firms can work together. New

tools focus on the processes that ensure optimal outcomes — in essence bringing the client into the kitchen — closer to the firm, the process and the result.

The development of litigation management platforms that mirror how defense attorneys prepare (or should prepare) their cases creates new opportunities.

It has been difficult to bring firms and clients together in a collaborative environment for several reasons. First, the use of distinct technologies has meant the absence of real-time information sharing and slow adoption by firms. In addition, clients have generally looked at their client-side systems as general repositories into

which firms are to deposit information, like a status report or a key document.

This is a philosophical approach driven by technology limitations on both sides. Neither the document repositories nor the e-billing systems used by clients today truly manage the litigation process itself. Similarly, the case management processes used by firms, while generally consistent in action from one firm to another, are managed frequently on paper. Clients are still sitting in the restaurant waiting eagerly for the firms to send out status updates and key information from the kitchen. Watching the kitchen door attentively, clients wonder what information will be sent out next, what surprises are in store.

The development of litigation management platforms that mirror how defense attorneys prepare their cases, and that provides immediate access to clients, changes this old paradigm and creates new opportunities. Moving away from their paper-based systems, defense firms will use these platforms to prepare their case just as they do now, while providing complete transparency to their clients. They will prepare their cases just as a chef cooks in front of their guests at the Chef's Table, showcasing their creativity, their quality and skills in ways not previously possible.

Most defense firms do (or should) prepare cases with a certain common discipline. In varying ways, they develop a high-level Theory of the Case, which leads to a more detailed Litigation Plan and Budget. They continually perform exposure and financial

settlement analyses, and maintain complete records of oral, written and expert discovery. Firms track the litigation timeline of all court-ordered deadlines and discovery cut-offs; they identify certain documents and exhibits for later use at trial; they keep careful track of their legal research. They endeavor to maintain easily organized litigation files that provide access to key documents whenever they need them.

Firms that don't follow this discipline consistently achieve less than optimal outcomes

Why is this new paradigm so compelling?

Firms that don't follow this discipline consistently achieve less than optimal results and benefit (as do their clients) from moving to a more disciplined process. Those firms that do follow this discipline, but rely on inefficient paper-based systems, benefit from the use of technology to tie all case documents, discovery results and case strategies together. Every client communication and every recommendation is easily retrieved. Every document noted for later use at trial is catalogued and marked in real time. No longer will the defense attorney sit in his or her office on the eve of trial, wondering, "What is the theory of my case? Where are the documents I should use? What did I suggest this case was worth?"

The view from the clients' perspective is equally compelling. Above all, clients endeavor to have all their firms follow a generally consistent process to as to improve overall litigation management quality. As such, their firms' use of a consistent and firm-friendly tool to prepare the defense creates consistency even as it improves efficiencies. Clients benefit from being able to watch the preparation of, and to approve if desired, the firms' Theory of the Case, Litigation Plan and Budget and related Exposure Analyses. Clients can take assurance in knowing that their litigation management platform will identify cases on which these important processes have not been fulfilled.

There are certain principles to preparing a strong defense that mimics following a good recipe. Taking the plaintiff's deposition before defining the Theory of the Case and the Litigation Plan is akin to putting in the pasta before the water is boiling. The results are less than optimal. Litigation platforms of the future will help both sides manage the process itself – with workflow and alerting tools that identify approaching discovery deadlines, reporting requirements, requests for approval, changes to exposure analyses and other key litigation process items. Sitting at the Chef's Table means having an opportunity to identify steps taken out of process, ensuring that the end result will be as optimal as possible.

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their litigation managers*

General Counsel and Chief Claims Officers alike expect more today from their internal client-side litigation managers. They expect them to be more proactive, to offer instruction and guidance, to direct the defense and ensure that case strategies are well planned and not reactive. The quality and timeliness of the information made available to litigation managers is crucial to their ability to apply their expertise. In fact, the quality of the information made available to a litigation manager is really the defining factor in how good he or she can be in influencing the outcome of the litigation. In this respect, sitting in the kitchen watching as the case comes together is vastly different, and far superior, to waiting for the case to be delivered to the main dining room. It offers opportunity for greater involvement, greater participation and greater value.

Having a single-point-of-entry system for both firms and clients means that a client's requirements for internal litigation portfolio reporting can be met more efficiently and more powerfully. This is true whether the report involves an overall inventory analysis or budget variance report, or analyses performed in compliance with FAS 5 or Sarbanes-Oxley compliance. Which firms and lawyers fail to meet their reporting requirements? Which cases have overdue process steps that must be addressed? Which cases have had the most substantial changes to budgeting or exposure analysis? What are the next litigation steps across all cases? These are just some of the questions answered by a truly collaborative, firm-friendly, single-point-of-entry litigation management platform.

Litigation management is an evolving, dynamic discipline. It has come a long way from the country club dining environment of several decades ago. As the industry moves beyond its current focus of case categorization and legal invoice scrutiny, leaders will seek out emerging technologies to assist them in improving what really matters — case outcome. Leaders will adopt tools that manage the defense process itself, allow defense firms to showcase better their quality and creativity without duplicating efforts, while providing their internal corporate litigation managers with better information in order to achieve better results.

In essence, litigation managers of the future will get out of the dining room and move into the kitchen where they belong. And for those that do, "Bon Appetit!"

About the Author

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CaseKnowledge, Inc. is a litigation management software company, founded by defense attorneys, that offers its customers a unique solution for managing their rapidly growing litigation portfolios. CaseKnowledge reduces litigation expense, provides process controls, digitally manages the entire litigation file, and supplies management with metrics necessary to continually improve results. In October of 2004, CaseKnowledge was honored to have been selected as one of six finalists in the category that included litigation management solutions in the prestigious A.M. Best E-Fusion awards. More information about CaseKnowledge can be found at www.caseknowledge.com